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Georg Nolte

**How to Identify Customary International Law? –
On the Final Outcome of the Work of the International Law
Commission (2018)**

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How to Identify Customary International Law? – On the Final Outcome of the Work of the International Law Commission (2018)

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Abstract:

How to identify customary international law is an important question of international law. The International Law Commission has in 2018 adopted a set of sixteen conclusions, together with commentaries, on this topic. The paper consists of three parts: First, the reasons are discussed why the Commission came to work on the topic “Identification of customary international law”. Then, some of its conclusions are highlighted. Finally, the outcome of the work of the Commission is placed in a general context, before concluding.

* Professor of Law, Humboldt Universität Berlin; Member of the International Law Commission (ILC). This article is a refined version of the Honorable Shigeru Oda Commemorative Lecture given at the 121st Meeting of the Japanese Society of International Law on 4 September 2018 in Sapporo. The author is grateful to President Asada and the members of the Society for the honor of inviting him. He writes in his personal capacity and not for the Commission.

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1. Introduction

How to identify customary international law is one of the major questions for international lawyers. The International Law Commission has in 2018 adopted a set of sixteen conclusions, together with commentaries, on this topic.¹

The identification of customary international law is one of those areas in which Judge Shigeru Oda has made a lasting contribution to international law. An important part of his contribution consisted in work as counsel for the government of the Federal Republic of Germany in the proceedings in the North Sea Continental Shelf cases.² There, the International Court of Justice has laid the groundwork for how we conceive the formation and identification of customary international law.

The present article consists of three parts: First, the reasons why the Commission came to work on the topic “Identification of customary international law” are discussed (2.). Then, some of its conclusions are highlighted (3.). Finally, the outcome of the work of the Commission is placed in a general context (4.), before concluding (5.).

2. Why has the Commission worked on “Identification of customary international law”?

Customary international law is, by its very nature, unwritten law.³ The definition in Article 38, paragraph 1 (b) of the Statute of the International Court of Justice is well-known and lists among the sources of international law “international custom, as evidence of a general practice accepted as law”. This reference is short and obscure. It raises many questions, for example: what is “practice”? When is a practice “general”? Whose practice is it? And when can it be said to be “accepted as law”? Such questions have often been addressed by courts and in the literature.⁴ But there has been no explanation of this source of international law which is both relatively systematic *and* authoritative. Court judgments are authoritative, but not systematic; writings are (sometimes) systematic, but not authoritative. The International Law Association’s *London Statement of Principles Applicable to the Formation of General Customary International Law* of 2000⁵ was a very valuable effort, though some of its conclusions were controversial at the time, but even that eminent body lacks the authority which results from the official and representative character as well as from the methods of work, which the International Law Commission displays, in particular through its exchanges with the Sixth Committee of the General Assembly.

But is the International Law Commission the right institution to elaborate a systematic *and* authoritative explanation of how to identify customary international law? This is not obvious. The mandate of the Commission is, after all, the progressive development and the codification of international

¹ U.N. Doc. A/RES/73/203 (2018); see also ILC, “Draft conclusions on identification of customary international law and commentaries thereto”, *Report of the International Law Commission*, Seventieth Session (30 April-1 June and 2 July-10 August 2018), U.N. Doc. A/73/10 (2018), pp. 119-156.

² *North Sea Continental Shelf, Judgement*, I.C.J. Reports 1969, p. 3.

³ ILC, “General commentary”, *ILC 2018 Report*, *supra* note 1, p. 122, para. 3. See generally Peter Staubach, *The Rule of Unwritten International Law* (2018).

⁴ For an overview, see the bibliography prepared by the Special Rapporteur, Sir Michael Wood, “Fifth report on identification of customary international law, Addendum, Annex II: Identification of customary international law: revised bibliography”, U.N. Doc. A/CN.4/717/Add.1 (2018).

⁵ International Law Association Committee on Formation of Customary (General) International Law, *Final Report of the Committee, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference*, London (2000).

law.⁶ This mandate has long been understood to mean that the Commission should, in general, prepare draft articles which would serve as a basis for States to subsequently conclude a treaty.⁷ This is what the Commission did, for example, when it elaborated the draft articles on the law of treaties⁸ which States then transformed into the Vienna Convention on the Law of Treaties.⁹ Some of the provisions of the Vienna Convention already reflected rules of customary international law that were thereby “codified”, whereas others still had insufficient support in practice, which meant that their incorporation in the Vienna Convention represented a “progressive development”.¹⁰

When Sir Michael Wood proposed, in 2011, that the Commission deal with the topic “Formation and evidence of customary international law”, he stated at the outset that

“[t]he aim is not to seek to codify ‘rules’ for the formation of customary international law. Instead, the aim is to produce authoritative guidance for those called upon to identify customary international law, including national and international judges. It will be important not to be overly prescriptive. Flexibility remains an essential feature of the formation of customary international law. In view of this, the Commission’s final output in this field could take one of a number of forms. One possibility would be a series of propositions, with commentaries.”¹¹

This statement implied that the outcome of the work on customary international law should not be a treaty. It also meant that the work on the topic would not aim at the progressive development of international law. Article 15 the Statute of the Commission, after all, defines “progressive development of international law” as “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.”¹²

The Commission nevertheless did not overstep its mandate when it decided to put the proposed topic on customary international law on its agenda. This is because such work is a special form of codification as defined in Article 15, which is “the more precise formulation and systematization of

⁶ *Statute of the International Law Commission*, United Nations General Assembly resolution 174 (II) (21 November 1947), as amended by resolutions 485 (V) (12 December 1950), 984 (X) (3 December 1955), 985 (X) (3 December 1955) and 36/39 (18 November 1981), Article 1.

⁷ See, in particular, Articles 15 and 23 of the ILC Statute, *supra* note 6.

⁸ ILC, “Revised draft articles on the law of treaties”, *Yearbook of the International Law Commission 1966*, Vol. 2, pp. 112-124.

⁹ *United Nations Treaty Series*, Vol. 1155, p. 331.

¹⁰ In the course of its work, the ILC has sometimes emphasized that aspects of its products reflect a progressive development of international law, rather than its codification. In the general commentary to its “Draft articles on the responsibility of international organizations”, the Commission recognized that “[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.” *Report of the International Law Commission, Sixty-Third Session (26 April-3 June and 4 July-12 August 2011)*, U.N. Doc. A/66/10, p. 70, para. 5. Similar caveats can be found in the commentary to provisions of the “Guide to Practice on Reservations to Treaties”, *ibid.*, Add. 1, p. 73, para. 1 (Guideline 1.2.1); the “Articles on State responsibility”, *Yearbook of the International Law Commission 2001*, Vol. 2, part 2, p. 114, para. 4 (Article 41); p. 127, para. 12 (Article 42, paragraph 2(b)); and the “Draft articles on expulsion of aliens”, *Report of the International Law Commission, Sixty-Sixth Session (5 May-6 June and 7 July-8 August 2014)*, U.N. Doc. A/69/10, p. 18, para. 1 (general commentary); p. 60, para. 4 (Article 23(2)); pp. 73-74, para. 11 (Article 26(4)); p. 74, para. 1 (Article 27); p. 75, para. 1 (Article 29). See also Donald McRae, “The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission”, *Kokusaiho Gaiko Zasshi* [Journal of International Law and Diplomacy], Vol. 111, (2014), p. 4.

¹¹ Michael Wood, “Formation and evidence of customary international law”, *ILC 2011 Report*, *supra* note 10, p. 305, para. 4.

¹² Article 15 ILC Statute, *supra* note 6.

rules of international law in fields where there already has been extensive State practice, precedent and doctrine”.¹³ In any case, such work clearly contributes to the work of the Commission on the progressive development and codification of international law. Providing guidance for the identification of customary international law can thus be described as a “restatement” of international law, which is also a form of codification, though less definite than a treaty.¹⁴

It is thus not surprising that the decision of the Commission to work on this topic was generally welcomed by the Member States of the United Nations in 2012.¹⁵ Indeed, States had already accepted that the Commission elaborate other “restatements” of international law, as it had been the case, for example, for the “Guide to practice on reservations to treaties” (2011).¹⁶ Likewise, States accepted in 2012 that the Commission work on the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, a work that was also concluded in 2018.¹⁷ Such restatements have become one of the main activities of the Commission after the appetite of States to conclude treaties had diminished significantly during the past two decades or so.¹⁸ This change of emphasis in the work of the Commission has sometimes been described as a symptom of a crisis of the idea of codification, and even as a sign of a crisis of the Commission as an institution.¹⁹ Such assessments are not convincing. Codification, properly understood, is a never-ending task, which needs to be supplemented by the clarification of unwritten and written rules of international law, and their sources. Sir Michael Wood has described the situation of our time well when he wrote in his proposal of 2011:

“Notwithstanding the great increase in the number and scope of treaties, customary international law remains an important source of international law. The ideal of a fully codified law, rendering customary international law superfluous, even if it were desirable, is far from becoming a reality. In the past, much was written on the subject of customary international law. In recent years there has been a tendency in some quarters to downplay its significance. At the same time, ideological objections to the role of customary international law have diminished. There now appears to be a revival of interest in the formation of customary international law, in part stimulated by the attempts, sometimes quite controversial, of domestic courts to grapple with the issue. The formation of customary international law now has to be seen in the context of a world of nearly 200 States, and numerous and varied international organizations, both regional and universal.”²⁰

¹³ *Ibid.*

¹⁴ The first sentence of the presentation of the Commission on its website (“About the Commission”) reads: “The idea of developing international law through the restatement of existing rules or through the formulation of new rules is not of recent origin.” See <http://legal.un.org/ilc/ilcintro.shtml>.

¹⁵ ILC, “Formation and evidence of customary international law. Note by Michael Wood, Special Rapporteur”, U.N. Doc. A/CN.4/653 (2012), p. 1, para. 3.

¹⁶ *ILC 2011 Report*, *supra* note 11, pp. 12-51 and Add. 1.

¹⁷ U.N. Doc. A/RES/73/202 (2018); see also *ILC 2018 Report*, *supra* note 1, pp. 11-116.

¹⁸ Georg Nolte, “The International Law Commission Facing the Second Decade of the Twenty-first Century”, in Ulrich Fastenrath *et al.* eds., *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), pp. 781-792.

¹⁹ See, for example, Christian Tomuschat, “The International Law Commission – An Outdated Institution?”, *German Yearbook of International Law*, Vol. 49 (2006), pp. 92-100; Alain Pellet, “The ILC adrift? Some Reflexions from Inside”, in Miha Pogačnik ed., *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič* (2011), pp. 306-312.

²⁰ Wood, *Formation and evidence*, *supra* note 11, p. 305, para. 2.

It is indeed important to be aware of how customary international law has been identified over different historical periods.²¹ One should perhaps add the following: Until recently, the main problem for the identification of customary international law was a lack of information about the practice of many States and in many fields. Only a few academic journals, mostly from developed countries, published accounts of the practice of certain States, leading to critics asserting that the identification of customary international law is inherently biased, particularly against developing States.²² This situation had already been an important reason for the efforts of the Commission in 1950 to consider “ways and means for making the evidence of customary international law more readily available”.²³ Starting in the 1990s, however, the problem seems to be changing significantly: today there is an information overload, caused by an information revolution. Even least developed States can, in principle, make their position “readily available” worldwide by uploading information to the internet.²⁴ Even if a State does not publish a digest of its practice, it may leave a digital footprint of its practice which may, in principle, be identified. That does not mean, however, that the challenges have become the opposite. There is still a considerable asymmetry with respect to the capacities to produce, collect, and digest relevant information on State practice and *opinio juris*. Nevertheless, the new context must be appropriately taken into account.

Another important change taking place since the end of the 1980s consists in the fact that rules of customary international law have developed in more areas. And more international and national courts, as well as other actors, than ever before are confronted with the question whether there is a rule of customary international law which they must apply.²⁵ In this situation methodology has become more important as a means of bringing about some consistency in the determination of customary international law.²⁶

In their combination, the developments over the past thirty years pose a fundamental challenge for customary international law as a source of international law. These developments are positive at first sight because, after all, the means to identify customary rules are today more readily available, and more areas and actors exist for which such rules are relevant. At the same time, however, the explosion of information and the increase of the number of relevant actors, often non-governmental, risk to confuse and to dilute the standards for the formation and identification of customary rules. Today, not only governments, but also a multitude of courts, tribunals and other actors risk to apply different standards and to use the available information selectively for the purpose of arriving at certain results.²⁷ They may be led by preferences which prevail in certain fields and neglect more general considerations. In this situation it is important that the Internatio-

²¹ See e.g. J. Patrick Kelly, “Customary International Law in Historical Context”, in Brian Leppard ed., *Reexamining Customary International Law* (2017), pp. 47-85.

²² See e.g. George Rodrigo Bandeira Galindo and César Yip, “Customary International Law and the Third World: Do Not Step on the Grass,” *Chinese Journal of International Law*, Vol. 16 (2017), pp. 251-270; B. S. Chimni, “Customary International Law: A Third World Perspective”, *American Journal of International Law*, Vol. 112 (2018), pp. 6 and 20-27.

²³ *Yearbook of the International Law Commission 1950*, Vol. 2, pp. 367-374. See also *ibid.*, pp. 24-35, specifically pp. 30-31, paras. 66-67.

²⁴ See ILC, *Ways and means for making the evidence of customary international law more readily available. Memorandum by the Secretariat*, Seventieth Session, U.N. Doc. A/CN.4/710/Rev.1, 14 February 2019, pp. 4-7, paras. 8-14.

²⁵ See e.g. Brian D. Leppard, “Toward a New Theory of Customary International Human Rights Law”, in *idem* ed., *Reexamining Customary International Law* (2017), pp. 233-265.

²⁶ Cedric M. J. Ryngaert and Duco W. Hora Siccama, “Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts”, *Netherlands International Law Review*, Vol. 65 (2018) pp. 1-25.

²⁷ Chimni, *supra* note 22, p. 9.

nal Law Commission, a body which is responsible for general aspects of international law, tries to articulate and maintain a common standard, and to ascertain that the identification of customary rules is not done lightly. Otherwise, the authority and the value of customary international law as an important source of international law could diminish, particularly in the eyes of national legal systems. This background speaks in favor of insisting on some rigor with regard to the identification of customary international law and on continuity regarding the standards for the identification of such rules, as has been emphasized in the long-standing jurisprudence of the International Court of Justice.²⁸

It is against this background that the Commission has elaborated, in the comparatively short time of six years, from 2012 to 2018 and under the guidance of Sir Michael Wood as Special Rapporteur, a set of sixteen conclusions, with commentaries.²⁹ The term “conclusions” refers to the rich basis of materials from which they are drawn after intensive debates within the Commission. The term “guidelines”, which had also been proposed,³⁰ was considered less appropriate in the particular context of the identification and interpretation of sources of international law. Although the term “guidelines” may sound more normative at first impression, it is actually less so, given the fact that guidelines are often mere administrative recommendations.³¹ The term “conclusions”, on the other hand, is designed to convey that they rest on a firm basis in international law and practice and that they are therefore not merely recommendatory.

3. Select Conclusions

The Commission’s conclusions must be read together with the commentaries. The commentaries have been adopted word by word, and comma by comma, by the Commission, after much debate and deliberation.³² The commentaries on the conclusions on this topic are, however, relatively succinct. They mainly refer to the jurisprudence of the International Court of Justice, practice, and to a certain extent also to the jurisprudence of other international and national courts and tribunals. In contrast to many other outcomes of the work of the Commission, the commentaries on “Identification of customary international law” do not refer to academic writings. This is so even though the Special Rapporteur has extensively used and quoted academic writings in his four

²⁸ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgement, I.C.J. Reports 2012, p. 122, para. 55; see also Sienho Yee, “Report on the ILC Project on ‘Identification of Customary International Law’”, *Chinese Journal of International Law*, Vol. 14 (2015), pp. 375-398; Michael Wood, “The Present Position Within the ILC on the Topic ‘Identification of customary international law’: in partial response to Sienho Yee, Report on the ILC Project on ‘Identification of Customary International Law’”, *Chinese Journal of International Law*, Vol. 15(2016), pp. 3-15; Sienho Yee, “A Reply to Sir Michael Wood’s Response to My Report on the ILC Project”, *Chinese Journal of International Law*, Vol. 15 (2016), pp. 33-40; Noora Arajärvi, “The requisite rigour in the identification of customary international law”, *International Community Law Review*, Vol. 19 (2017), pp. 9-46.

²⁹ *ILC 2018 Report*, *supra* note 1.

³⁰ See statement by Mr. Murase in the debate on the fifth report by the Special Rapporteur, U.N. Doc. A/CN.4/SR.3397 (2018), p. 4.

³¹ See statement by the author in the debate on the fifth report by the Special Rapporteur, U.N. Doc. A/CN.4/SR.3400 (2018), p. 10.

³² See summary records of the 3441st meeting, U.N. Doc. A/CN.4/SR.3441 (2018); 3442nd meeting, U.N. Doc. A/CN.4/SR.3442 (2018); 3443rd meeting, U.N. Doc. A/CN.4/SR.3443 (2018); 3444th meeting, U.N. Doc. A/CN.4/SR.3444 (2018).

reports before the first reading of the conclusions and commentaries,³³ and has prepared an extensive bibliography.³⁴ The main reason why the Commission, on the proposal of the Special Rapporteur, has chosen this approach was apparently that the Commission should produce an outcome that would be self-contained and easily readable for non-experts in international law, particularly for judges of national courts, and that such an outcome should concentrate on the most generally recognized authoritative sources. This is a legitimate goal, but it seems to imply – even if this not intended – a regrettable devaluation of the role of teachings as a subsidiary means for the determination of rules of international law.³⁵

a) Two-element approach

The conclusions rest on the “two-element approach”. This is clearly stated in conclusion 2, and it is further spelt out in conclusion 3, as well as in the basic distinction between parts 3 and 4 of the set of conclusions, which deal in turn with each of the two constituent elements of customary international law. The two-element approach means that those who are called upon to identify rules of customary international law must engage in two distinct operations: a) they must determine whether a “general practice” exists, and b), they must determine whether this general practice is “accepted as law”. This approach may seem obvious to readers of Article 38 of the Statute of the International Court of Justice, and to readers of the judgments of that court.³⁶ But this approach cannot be taken for granted. Indeed, theories have been developed by scholars according to which it would be sufficient to show either a general practice or a general acceptance of an alleged rule as law.³⁷ And some courts, while paying lip-service to the two-element approach, have sometimes collapsed the two elements, for example by assuming that a generally accepted text would imply that there also existed a general practice which followed the rule which is contained in the text.³⁸ This is what has been criticized as “double counting” (using the same act for two different purposes).³⁹ This phenomenon of double counting should not, however, be confused

³³ Michael Wood, “First report on identification of customary international law”, U.N. Doc. A/CN.4/663 (2013); “Second report on identification of customary international law”, U.N. Doc. A/CN.4/672 (2014); “Third report on identification of customary international law”, U.N. Doc. A/CN.4/682 (2015); “Fourth report on identification of customary international law”, U.N. Doc. A/CN.4/695 (2016).

³⁴ *Supra* note 4. Upon the Commission’s recommendation, the General Assembly “noted” the bibliography, together with the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (*supra* note 1). See U.N. Doc. A/RES/73/203 (2018) and *ILC 2018 Report*, *supra* note 1, p. 118, para. 63.

³⁵ As which they are recognized in Article 38, paragraph 1 (d) of the ICJ Statute.

³⁶ See, for example, *North Sea Continental Shelf*, *supra* note 2, p. 44, para. 77.

³⁷ See, for example, ILA, “Principle 16 and commentary thereto”, *Statement of Principles*, *supra* note 5, ; Anthea Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation”, *American Journal of International Law*, Vol. 95 (2001), p. 757; Chimni, *supra* note 22, pp. 27-30; many more contributions are listed in the revised bibliography prepared by the Special Rapporteur, *supra* note 4, pp. 3-17.

³⁸ Domestic and international courts have been criticized for inferring rules of customary international law from treaties or non-binding instruments without sufficiently examining State practice. See e.g. Noora Arajärvi, “From the ‘Demands of Humanity’: The Formulation of *Opinio Juris* in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice”, in Brian D. Lepard ed., *Reexamining Customary International Law* (2017), pp. 205-229; Ryngaert and Hora Siccama, *Ascertaining Customary International Law*, *supra* note 26, pp. 6-14; Stefan Talmon, “Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion”, *European Journal of International Law*, Vol. 26, (2015), pp. 434-443. But see also O. Sender, M. Wood, “The International Court of Justice and Customary International Law: A Reply to Stefan Talmon”, *EJIL Talk* (November 2015), at: <https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/>.

³⁹ See, for example, statement in plenary by Mr. Murase, U.N. Doc. A/CN.4/SR.3223 (2014), p. 9.

with abbreviated reasoning. Abbreviated reasoning takes place when a court quotes a generally recognized text, such as a resolution by an international organization, and thereby also implicitly refers to a generally known practice, but without giving an elaborate account of this practice.⁴⁰ International courts are usually in a better position to assess whether an abbreviated reasoning is acceptable in a particular case and with respect to specific rules. But legitimate concerns have been expressed that some courts, particularly national courts, often too easily assume that a rule which is expressed in a text has a sufficient basis in State practice.⁴¹

The “two-element approach” does not, however, mean that the two constituent elements are “two juxtaposed entities”. They are often “rather only two aspects of the same phenomenon: a certain action which is subjectively executed and perceived in a certain fashion.”⁴² This means that the concern about double counting should not lead to the conclusion that a specific practice may never simultaneously express the subjective acceptance of States to be bound. The point is rather that the subjective element needs to be separately identified, not that it is necessarily manifested in a different act.⁴³ For example, a judgment of a national court on the issue of immunity of a foreign State official may serve as practice, but may also express that the result is mandated or permitted under customary international law – and thus, from a different perspective, serve as evidence of acceptance as law as well.

The Commission has also sharpened the distinction between the two elements of customary international law by regularly adding the words “*opinio juris*” in brackets when referring to the expression “accepted as law”. As Professor Murase has rightly noted, the verb “accept” is rather ambiguous.⁴⁴ In many situations it is understood as reflecting a rather passive attitude, or, to the contrary, as requiring some kind of formal consent. The expression “*opinio juris*”, on the other hand, evoke a more active conviction. Indeed, the International Court of Justice has often used expressions like “feeling”, “belief”, “conviction”, and “motivation”, all of which seem to be stronger than “acceptance”.⁴⁵ This is not merely a linguistic matter. By adding the expression “*opinio juris*” to it, the term “accepted as law” is explained as not including a mere grudging acceptance by the weak against the assertions of the strong, but as requiring a positive attitude.

The commentaries make it clear, again as proposed by Professor Murase,⁴⁶ that the conclusions do not require that in the identification of customary international law the general practice must be identified first and only then can its acceptance as law be ascertained.⁴⁷ Indeed, in practice, the relationship between the two elements in the formation and identification of customary international law often takes the form of a dialectical process. In any case, conclusion 3 makes clear

⁴⁰ See, on the one hand, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, February 25, 2019, paras. 142 and 148-150; and, on the other, *Jurisdictional Immunities*, *supra* note 28, pp. 127-135, paras. 64-79; for another approach see Niels Petersen, “The International Court of Justice and the Judicial Politics of Identifying Customary International Law”, *European Journal of International Law*, Vol. 28 (2017), pp. 357-385.

⁴¹ Ryngaert and Siccamo, *supra* note 26.

⁴² Wood, *Third Report*, *supra* note 33, p. 5, para. 13, quoting Brigitte Stern, “Custom at the Heart of International Law”, *Duke Journal of Comparative and International Law*, Vol. 11 (2001), p. 92.

⁴³ ILC, “Conclusion 3(2)”, *ILC 2018 Report*, *supra* note 1, p. 119; “Commentary to conclusion 3”, *ibid.*, p. 129, para. 8.

⁴⁴ See statement by Mr. Murase, *supra* note 39, p. 9.

⁴⁵ See ILC, “Commentary to conclusion 9”, *ILC 2018 Report*, *supra* note 1, pp. 138-139, para. 2.

⁴⁶ Statement by Mr. Murase, *supra* note 39, p. 9.

⁴⁷ ILC, “Commentary to conclusion 3”, *ILC 2018 Report*, *supra* note 1, p. 129, para. 9.

that it is necessary to ascertain “[w]hether there is a general practice *and whether that practice is accepted as law*”.⁴⁸

b) Whose practice counts?

Conclusion 4, entitled “Requirement of Practice”, has been the most debated conclusion, and perhaps the most controversial. It concerns the question whose practice counts for purposes of the formation and identification of customary international law. This question has become important since more and more actors other than States have become relevant in international affairs, at least politically. Such actors not only include intergovernmental organizations, but also non-governmental organizations.

In 2014, when he first addressed the question, the Special Rapporteur proposed the following draft conclusion:

“The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.”⁴⁹

By making this proposal, he emphasized the central role of States in the formation and identification of customary international law, despite the increased involvement of other actors in international relations. By using the word “primarily”, however, he did acknowledge that it is not exclusively the practice of States that contributes to the formation of customary international law. This approach was somewhere between those who advocate an exclusive position for States and those who have a very open understanding regarding those whose activities should count as practice.⁵⁰ It was only in a separate provision that the Special Rapporteur proposed that “[t]he acts (including inaction) of international organizations may also serve as practice”.⁵¹ Some members criticized this proposal, preferring not to acknowledge such a role for international organizations at all.⁵² Some members, however, did not consider it to be enough that the “secondary” role of other actors than States would be hidden away under a conclusion that was meant to provide details on the various forms that practice may take.⁵³ The Drafting Committee therefore decided to provisionally add the following paragraph 2 to the draft conclusion:

“In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.”⁵⁴

The Drafting Committee also agreed to ask the Special Rapporteur to provide a fuller assessment of the role of international organizations in the formation of customary international law in his

⁴⁸ ILC, “Conclusion 3(1)”, *ILC 2018 Report*, *supra* note 1, p. 119 (emphasis added).

⁴⁹ As draft conclusion 5, see Wood, *Second Report*, *supra* note 33, p. 73.

⁵⁰ See, on the one hand, critical comments by several States in the 6th committee, summarized by Michael Wood, “Fifth report on identification of customary international law”, U.N. Doc. A/CN.4/717 (2018), pp. 16-18, paras. 38-39; and, on the other hand, e.g. Laurence Boisson de Chazournes, “Subsequent practice, practices, and ‘family resemblance’: towards embedding subsequent practice in its operative milieu”, in Georg Nolte ed., *Treaties and Subsequent Practice* (2013), pp. 60-62.

⁵¹ Wood, *Second Report*, *supra* note 33, p. 73.

⁵² See statements in plenary by Mr. Murphy, U.N. Doc. A/CN.4/SR.3224 (2014), pp. 8-9; U.N. Doc. A/CN.4/SR.3251 (2015), pp. 3-4; and Mr. Hmoud, U.N. Doc. A/CN.4/SR.3226 (2014), p. 5; U.N. Doc. A/CN.4/SR.3251 (2015), p. 11.

⁵³ See, for example, statement in plenary by Ms. Escobar Hernández, U.N. Doc. A/CN.4/SR.3226 (2014), pp. 7-8.

⁵⁴ Wood, *Third Report*, *supra* note 33, pp. 46-47, para. 68; see also U.N. Doc. A/CN.4/SR.3242 (2014), p. 12.

next report.⁵⁵ The Special Rapporteur, in his third report in 2015, then offered an elaborate explanation for the provisionally adopted paragraph 2 and explained that “the contribution of [practice of] international organizations as such to the formation and identification of rules of customary international law is most clear-cut in instances where States have assigned State competences to them”, certainly as exclusive competences.⁵⁶

The role of international organizations remained the most contentious issue until the end. After the Commission had adopted paragraph 2 of conclusion 4 on first reading in 2016, a number of States criticized this provision sharply as going too far in recognizing a role of international organizations in the formation of customary international law which was independent of that of States.⁵⁷ The Special Rapporteur, in his fifth and last report to the Commission in 2018, tried to accommodate the views of those States by emphasizing that the role of international organizations is limited to “certain cases”, and proposing to clarify that then their practice “may also” contribute to the formation of customary international law.⁵⁸

When the Commission discussed this proposal on second reading in May 2018, the members were aware that, among the reactions of States, those States which are more fully integrated in different international organizations, particularly regional organizations, tended to support the text as adopted on first reading, whereas States which are less integrated in such organizations tended to play down the role of such organizations in the formation of customary international law. The difference between the two approaches probably resulted from the following attitudes: Those States which are less integrated in international organizations are concerned that States which are so integrated could increase their relative influence on the formation of customary international law simply by establishing international organizations (another form of “double counting”). On the other hand, those States which are more integrated in international organizations are concerned that they could lose influence on the formation of customary international law if international organizations are not recognized as playing a role in this context, because, after all, such States often do not continue to play an independent, or uncoordinated, role in the areas where the international organization acts on their behalf. Both underlying concerns of the two groups of States needed to be addressed and, as far as possible, satisfied by the Commission.

The Commission was also aware of a criticism according to which the conclusions adopted on first reading did not take the role of international organizations seriously enough, given their significant presence on the international plane, the diversity of their practice and the widespread recognition that such organizations are bound by customary international law.⁵⁹ It is true that the Commission did not discuss in detail how far the “practice” or the “established practice” of an international organization, terms which originate from the context of treaty law, are relevant in the context of

⁵⁵ ILC, *Identification of customary international law. Statement of the Chairman of the Drafting Committee* (7 August 2014), pp. 4, 8, 9, 13 and 18, footnote 2, available at http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf&lang=E.

⁵⁶ Wood, *Third Report*, *supra* note 33, p. 53, para. 77.

⁵⁷ ILC, “Identification of customary international law. Comments and observations received from Governments”, U.N. Doc. A/CN.4/716 (2018); Wood, *Fifth Report*, *supra* note 50, pp. 16-18, paras. 38-39.

⁵⁸ Wood, *Fifth Report*, *supra* note 50, p. 22, para. 47 (“In certain cases, the practice of international organizations may also contribute to the expression, or creation, of a rule of customary international law”).

⁵⁹ Niels Blokker, “International Organizations and Customary International Law – Is the International Law Commission taking International Organizations Seriously?”, *International Organizations Law Review*, Vol. 14 (2017), pp. 1-12.

the identification of customary international law.⁶⁰ But this would have raised questions which the Commission might not have been able to resolve easily. The more fundamental question, however, is whether it is true that if international organizations are bound by rules of customary international law, in particular in the areas of human rights and international humanitarian law, it needs to be accepted that they can also contribute to the formation, or expression, of rules of customary international law.⁶¹ This appeal to reciprocity possesses some intuitive plausibility, but it is ultimately not a cogent argument. To be subjected to a rule does not necessarily imply a particular, or equal, competence to contribute to its formation. Individuals and groups are, for example, subjected to certain rules of international humanitarian law and international criminal law, but they do not contribute directly to the formation of such rules.⁶²

Ultimately, the Commission concluded that the text, as it had been adopted at first reading, had succeeded in finding an acceptable balance by recognizing and by emphasizing, in draft conclusion 4, paragraph 1, that is “primarily” the practice of States that contributes to the formation of customary international law.⁶³ The insertion of the word “may” in paragraph 2 of the same draft conclusion would have unnecessarily raised the threshold for the practice of international organizations to be relevant. If international organizations act in areas in which their members would otherwise have acted, the practice of the organization needs to count because its member States would otherwise be deprived of their role in the formation of customary international law by establishing an international organization and letting it act on their behalf. The Commission decided to address the concerns of those States which had demanded a change in the text of the pertinent conclusion by substantially rephrasing the commentary to conclusion 4.⁶⁴

The role of international organizations was not the only important issue in connection with the “Requirement of practice”. The question of the role of non-governmental organizations was also raised. The Special Rapporteur proposed, simply “in order to clarify the position in regard to non-State actors, as reflected in the 2014 debate ... to omit ‘primarily’ ... and include a new paragraph 3”, which read:

“Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.”⁶⁵

By making this proposal, he expressed the view of a great majority of members who wished to make it clear that non-governmental organizations are *not* to be recognized as contributing directly to the formation of customary international law. Fortunately, the rather blunt way in which the relevance of non-governmental organizations was denied in this proposal was later somewhat nuanced when the Commission followed the example which it had set in the context on its work on the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”. There the Commission had also stressed that subsequent practice which is relevant for

⁶⁰ *Ibid.*, pp. 7-8

⁶¹ *Ibid.*, pp. 10-12.

⁶² Jean-Marie Henckaerts and Louise Doswald-Beck eds., *International Committee of the Red Cross - Customary International Law – Rules*, Vol. 1 (1995), Rule 139, pp. 497-498; Heike Krieger, “Rights and Obligations of Third Parties in Armed Conflicts”, in Eyal Benvenisti and Georg Nolte eds., *Community Interests Across International Law* (2018), pp. 448-468.

⁶³ ILC, “Conclusion 4(1)”, *ILC 2018 Report*, *supra* note 1, p. 119.

⁶⁴ ILC, “Commentary to conclusion 4”, *ILC 2018 Report*, *supra* note 1, pp. 131-132, paras. 4-7.

⁶⁵ Wood, *Third Report*, *supra* note 33, p. 54, para. 79.

treaty interpretation must be that of States. Indeed, according to conclusion 5, paragraph 2, of that topic,

“Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32”.⁶⁶

However, in the topic on treaty interpretation the Commission had added a second sentence according to which

“Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.”⁶⁷

The Commission followed this example in its work on customary international law by adding a parallel element to paragraph 3 of conclusion 4 of that topic, which recognizes that the conduct of “other actors” may, for example, stimulate or record relevant practice. The Commission has thereby given some room, for example, to have the practice of the ICRC and certain other non-state actors taken into account in the process of identifying customary international law, without, however, putting their practice on the same level as the practice of States and of international organizations.⁶⁸

c) Verbal acts and inaction as forms of practice and of evidence of acceptance as law (*opinio juris*)

Conclusion 6 addresses the question which forms practice can take. The classical form of practice are physical acts “on the ground”. However, the conclusion goes further by recognizing, in accordance with the jurisprudence of the International Court of Justice,⁶⁹ that verbal acts as well as inaction may also be forms of practice. However, conclusion 6, paragraph 1, makes a distinction between the two by including verbal acts in the category of practice, as by definition, whereas recognizing inaction only with the restrictive words “may, under certain circumstances”.⁷⁰ The significance of these words becomes clear if one looks at the debates in the Commission and at the commentaries.

If verbal acts would indeed be a form of practice like physical acts “on the ground”, the two-element approach could be completely negated. After all, the two-element-approach rests on the distinction between, first, a “general practice” that is, second, “accepted as law (*opinio juris*)”.⁷¹ Since expressions of acceptance as law are usually found in verbal acts, the “two-element” requirement could then always be satisfied by looking at the same verbal acts, but only from two different perspectives. The commentary restricts this possibility by saying that “verbal conduct (whether written or oral) may also count as practice; indeed, practice may at times consist entirely of verbal acts, for example, diplomatic protests.”⁷² The commentary thereby approximates verbal conduct somewhat to the condition under which inaction may be relevant. Verbal practice can thus be

⁶⁶ ILC, “Conclusion 5(2)”, *ILC 2018 Report*, *supra* note 1, p. 14.

⁶⁷ *Ibid.*

⁶⁸ ILC, “Commentary to conclusion 5”, *ILC 2018 Report*, *supra* note 1, p. 39, paras. 9-10.

⁶⁹ See, for example, *Jurisdictional Immunities*, *supra* note 28, pp. 134-135, para. 77.

⁷⁰ ILC, “conclusion 6(1)”, *ILC 2018 Report*, *supra* note 1, p. 120.

⁷¹ See *supra* section III 1.

⁷² ILC, “Commentary to conclusion 6,” *ILC 2018 Report*, *supra* note 1, p. 133, para. 2.

practice where verbal action is part of the formation and expression of the rule, but not just a statement about it.

The question of inaction gave rise to an intense debate within the Commission and attracted the attention of a significant number of States. This question is relevant not so much for the definition of practice, but rather for the determination of what constitutes “acceptance as law (*opinio juris*)”. The Special Rapporteur had originally proposed the sentences “Inaction may also serve as practice” and “Inaction may also serve as evidence of acceptance as law.”⁷³ These sentences would have referred all further questions to the commentary. Some members, however, insisted that the qualifier “may” should be explained more clearly in the text of the draft conclusions themselves.⁷⁴ The problem which arises in this context is that, on the one hand, many States do not have the capacity to follow all relevant developments and to form a view on them. Many States are thus reluctant to accept too easily the relevance of inaction as potential evidence of acceptance as law.⁷⁵ But it is also true that many established and legitimate rules of customary international law would not exist if the conditions for the relevance of inaction were too strict, especially in the case of prohibitive rules where the practice consists of abstention from acting.

The Special Rapporteur then made the proposal to formulate that the inaction must be “deliberate” in order to be able to count as a form of practice.⁷⁶ This, however, could have meant for some that a “general practice”, which must already be “sufficiently widespread and representative”, can only come about if almost all States which do not actively engage in the practice must “deliberately” refrain from doing so. Such a requirement could make it, realistically speaking, difficult in many plausible cases to demonstrate that an omission is deliberate, despite the vastly expanded sources of information today. It cannot be right that the lack of a demonstrable deliberation on the part of a substantial number of States should prevent the formation and identification of rules of customary international law if there is otherwise a widespread practice in respect of such rules. This is not to say that the positions of relatively passive States, which are merely conscious of a development, are not important. They are, and such States can today make their positions known more easily than ever before, including by pooling their resources within regional organizations. Interestingly, although the Commission ultimately decided not to include the word “deliberate” in the text of conclusion 6, it does use it in the commentary, more or less interchangeably with the word “conscious”.⁷⁷

As far as the conditions are concerned under which inaction can be a form of “acceptance as law (*opinio juris*)”, the formulation in conclusion 10, paragraph 3, follows the approach which the Commission has adopted regarding the parallel question which arises in the topic of “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”. Conclusion 10, paragraph 2, of that topic also uses the formulation “when the circumstances call for some reaction”.⁷⁸ Professor Murase’s point according to which some States may be more reluctant than others to speak up in the face of a practice with which they do not agree is understandable. It

⁷³ See Wood, “Draft conclusions 7(3) and 11(3)”, *Second Report*, *supra* note 33, pp. 73-74.

⁷⁴ See, for example, statements in plenary by Mr. Murphy, U.N. Doc. A/CN.4/SR.3224 (2014), p. 9; and Ms. Escobar Hernández, U.N. Doc. A/CN.4/SR.3226 (2014), p. 8.

⁷⁵ For examples see Wood, *Fifth Report*, *supra* note 50, p. 24, para. 53.

⁷⁶ Wood, *Fifth Report*, *supra* note 50, p. 25, para. 55.

⁷⁷ ILC, “Commentary to conclusion 6”, *ILC 2018 Report*, *supra* note 1, p.133, para. 3.

⁷⁸ ILC, “conclusion 10(2)”, *ILC 2018 Report*, *supra* note 1, p. 15.

should, however, also be recognized that subtle forms of disapproval are also sufficient to express disagreement; and that silence may indeed be taken sometimes to mean acquiescence.

d) Assessing a State's practice

Conclusion 7 contains an interesting element. Paragraph 2 states:

“Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.”⁷⁹

This paragraph is a consequence of the general requirement that the practice of a State must be unequivocal and consistent in order to count as forming part of a more general practice.⁸⁰ However, in the case of some States, including democratic States under the rule of law, such consistent practice sometimes cannot be identified easily because one State organ may follow a different practice than another. Sometimes such States are unable to reconcile the practice of their different organs. Such cases seem to arise more frequently in recent times.⁸¹ But what is the alternative to the rule contained in conclusion 7, paragraph 2? Should other States, or international and national courts be encouraged to determine what a State which speaks with different voices “really means”? The commentary to the conclusion provides some guidance on this matter.

e) Specially affected States and persistent objectors

The principle of sovereign equality of States requires that all States are equal when it comes to the formation of customary international law. And the rules of customary international law are, in principle, binding on all States. However, two doctrines appear to recognize exceptions to the equal and the general character of customary international law: the doctrine of “specially affected States” and the doctrine of “persistent objector”. The Special Rapporteur attempted to have both doctrines recognized in the text of the draft conclusions. He only succeeded with one and encountered some difficulties with the other -which was eventually only mentioned in the commentary.

In his second report, the Special Rapporteur proposed the following draft conclusion:

“In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.”⁸²

Since the concept of “specially affected States” gave rise to objections, the Drafting Committee decided that it should not be recognized in the text of the conclusions.⁸³ The Special Rapporteur then proposed to explain the concept of “specially affected States” in the commentary to conclusion 8. But even that gave rise to a debate where an impassioned plea was made, in the name of the sovereign equality of States, not to recognize the concept and the role of “specially

⁷⁹ ILC, “conclusion 7(2)”, *ILC 2018 Report*, *supra* note 1, p. 120.

⁸⁰ ILC, “Commentary to conclusion 7”, *ILC 2018 Report*, *supra* note 1, p. 135, para. 4.

⁸¹ One example is the conflicting practice of the Government of Greece, the Hellenic Supreme Court, and the Greek Special Supreme Court addressed in the *Jurisdictional Immunities* case, *supra* note 28, paras. 76 and 83. See ILC, “Commentary to conclusion 7”, *ILC 2018 Report*, *supra* note 1, p. 135, paras. 3-4.

⁸² As draft conclusion 9(4), see Wood, *Second Report*, *supra* note 33, p. 74.

⁸³ ILC, *Identification of customary international law. Statement of the Chair of the Drafting Committee* (25 May 2018), p. 10, available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_icil.pdf&lang=E.

affected States” and thereby to privilege “great powers”.⁸⁴ This position, however, rests on a doubtful premise. The concept of “specially affected States” does not and should not privilege great powers, or stronger States in general.⁸⁵ To the contrary. A great power that claims to be affected by everything because it involves itself in everything cannot claim to be “specially affected” by everything, but only that it is, so to speak, “generally affected”. A smaller or weaker State which has recognizable specific interests, on the other hand, can often more plausibly invoke the concept. Smaller States need the concept of “specially affected States” more than larger States for the protection of their voice and their interests in the formation of customary international law. A compromise was found by adding the following sentence to the commentaries: “the term ‘specially affected States’ should not be taken to refer to the relative power of States”.⁸⁶

Some opposition was also voiced against the inclusion of the “persistent objector” rule. Thus, Professor Murase objected that the concept of persistent objector raises a question of application of customary international law, and not its identification.⁸⁷ Others expressed the concern that this rule would serve as a privilege for powerful States.⁸⁸ The Commission nevertheless ultimately kept the conclusion on persistent objector, both on the strength of the existing precedents and on the assumption that its application necessarily involved the need to identify the scope of the rule of customary international law in question.⁸⁹ On closer inspection, the persistent objector rule does not serve as a privilege of the powerful, to the contrary.⁹⁰ The classical examples concern cases in which less powerful States have stubbornly refused to join a certain development.⁹¹ The recognition of the “persistent objector” is also not contrary to the idea of the law, or of customary international law. To the contrary, it is an important element for the legitimation of the rules of customary international law, and for ensuring that the process of its formation is transparent.

4. General context

The original proposal by Sir Michael Wood, in 2011, was that the Commission deal with the topic under the title “Formation and evidence of customary international law”.⁹² After initially accepting this proposal, the Commission later changed the title of the topic to “Identification of customary international law”.⁹³ This change of title is symptomatic of the increasingly narrower focus of the work of the Commission over time.

The most obvious narrowing of the focus is visible in the dropping of the reference to the “formation” of customary international law. This change was due to pragmatic and, in a good sense,

⁸⁴ Statement in plenary by Mr. Tladi, U.N. Doc. A/CN.4/SR.3397 (2018), pp. 6-7.

⁸⁵ Yee, *supra* note 28, para. 48; Kevin John Heller, “Specially-Affected States and the Formation of Custom,” *American Journal of International Law*, Vol. 112 (2018), pp. 241-243.

⁸⁶ ILC, “Commentary to conclusion 8”, *ILC 2018 Report*, *supra* note 1, p. 137, para. 4.

⁸⁷ See his statement in plenary, U.N. Doc. A/CN.4/SR.3397 (2018), p. 4.

⁸⁸ See, for example, statement in plenary by Mr. Grossman Guiloff, U.N. Doc. A/CN.4/SR.3401 (2018), p. 7; Galindo and Yip, *supra* note 22, pp. 266-268.

⁸⁹ See the statements of the Chair of the Drafting Committee in 2015, pp. 18-19, available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_cil.pdf&lang=EF; and in 2018, *supra* note 83, p. 16.

⁹⁰ Yee, *supra* note 28, para. 58.

⁹¹ In particular Norway in the *Fisheries case*, *Judgment of December 18th, 1951*, *I.C.J. Reports 1951*, p. 116.

⁹² Wood, *Formation and evidence*, *supra* note 11, p. 305.

⁹³ ILC, *Report of the International Law Commission, Sixty-Fifth Session* (6 May–7 June and 8 July–9 August 2013), U.N. Doc. A/68/10 (2013), p. 93, para. 65.

positivistic arguments in favor of limiting the work to what is useful for a practicing lawyer.⁹⁴ It had also been said that dealing with the “formation” of customary international law might get the Commission too deeply into legal theory, social sciences and politics.⁹⁵ And Professor Murase criticized that consideration of “formation” would mean an impossible task of identifying the “material sources” of customary international law.⁹⁶ But the view was also expressed that the work should not be reduced to the “evidence”, or the “identification” of customary international law, but that it should also include some consideration of its “formation”. There is the argument, for example, that there is a “trend” in a certain area of the law. This argument sometimes plays an important role,⁹⁷ even in legal argument before courts, and in their reasoning.⁹⁸ The Special Rapporteur himself has quoted approvingly the reasoning of a British judge according to whom “it is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward looking and reflective of values it may be, is simply not accepted by other states”.⁹⁹ Where there is only a trend, the Special Rapporteur explained, the clear result is that, at that point in time, there is no rule.¹⁰⁰ This argument cannot be dealt with by assuming a “snapshot perspective” which merely determines what “evidence” is necessary to identify customary international law at a specific point in time.

A narrowing of the focus of the work on the topic has also occurred with respect to the ambition to situate customary international law within the sources of international law more generally. In his first report, the Special Rapporteur had addressed the relationship between customary international law and other sources of international law. He at least proposed a “without prejudice” clause in that respect and recognized the close interrelationship between customary international law, treaties and general principles of law.¹⁰¹ Indeed, general principles of law, such as the principle of good faith, will often be relevant for determining the content of particular rules of customary international law and *vice versa*. Although some members strongly advocated dealing with the interrelationship of customary international law and general principles of law under Article 38, paragraph 1 (c) of the Statute of the International Court of Justice,¹⁰² the Commission ultimately decided not to do so. Fortunately, the Commission will have an opportunity to deal with

⁹⁴ Statement in plenary by Mr. Forteau, U.N. Doc. A/CN.4/SR.3181 (2013), p. 7.

⁹⁵ Statement in plenary by Mr. Petric, U.N. Doc. A/CN.4/SR.3182 (2013), p. 9; contra: Chimni, *supra* note 22, pp. 14-20.

⁹⁶ Statement in plenary by Mr. Murase, U.N. Doc. A/CN.4/SR.3181 (2013), p. 5; contra: Chimni, *supra* note 22, pp. 14-20.

⁹⁷ See e.g. Concepción Escobar Hernández, “Fifth report on immunity of State officials from foreign criminal jurisdiction,” U.N. Doc. A/CN.4/701 (2017), pp. 53-54, para. 121, pp. 73-74, para. 179.

⁹⁸ The Seabed Chamber of the International Tribunal for the Law of the Sea has observed a “trend towards making [the precautionary approach] part of customary international law”. *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion (of the Seabed Disputes Chamber)*, February 1, 2011, International Tribunal for the Law of the Sea Report 2011, para. 135; see also *A. v. Office of the Public Prosecutor of the Confederation, Judgment of July 25, 2012*, BB.2011.140 (Switzerland Federal Criminal Court), para. 5.3.5 (“[I]l est indéniable qu’il existe une *tendance manifeste* sur le plan international à vouloir restreindre l’immunité des (anciens) chefs d’Etat en cas de crimes relevant du *ius cogens*”) (emphasis added).

⁹⁹ *Jones v. Saudi Arabia* [2006] UKHL 26 (Lord Hoffman) (U.K. House of Lords), para. 63; see also Wood, *First Report*, *supra* note 33, p.37, para. 84 and footnote 180.

¹⁰⁰ See Wood, *Fourth Report*, *supra* note 33, p.5, para. 16.

¹⁰¹ See the elaborate discussion in the *First Report*, *supra* note 33, pp. 12-17; and *Second Report*, *supra* note 33, p. 72.

¹⁰² See, for example, statements in plenary by Mr. Petrič, U.N. Doc. A/CN.4/SR.3182 (2013), p. 9 and the author, U.N. Doc. A/CN.4/SR.3400 (2018), p. 10.

this interrelationship after it has decided, in 2018, to put the topic “General Principles of Law” on its current programme of work.¹⁰³ The Commission should now attempt to minimize the risk that customary international law is perceived as only consisting of an assortment of certain specific rules, such as those on immunity or diplomatic protection, which can be simply recognized by looking at practice. Customary international law rather consists of rules on a different level of generality which may influence each other. For example, an older specific rule may be affected by a more recently recognized general principle of law or of customary international law whose implications for the specific rule have not yet been recognized.

5. Conclusion

The outcome of the work of the Commission will hopefully be recognized by States and others as providing a reliable, but also sufficiently flexible framework for identifying one of the most important sources of international law. States which commented on it have found it to be an important and valuable resource, and the UN General Assembly brought the conclusions “to the attention of States and all who may be called upon to identify rules of customary international law, and encourage[d] their widest possible dissemination”.¹⁰⁴ Japan has said that the Commission’s work “had the potential to make a useful contribution to the development of international law”.¹⁰⁵ The work is an attempt to take stock of a foundational area of international law, and it is an effort to maintain and to reintroduce the necessary commonality without which law cannot work. Some may view this effort as being too ambitious, and they may even be skeptical about this attempt at providing orthodoxy. Be this as it may, the Special Rapporteur, Sir Michael Wood, has prepared and guided this work in a way which has been generally recognized as excellent by States and the members of the Commission. May the work on this topic become, and remain, one of the signature outcomes of the work of the Commission.¹⁰⁶

¹⁰³ *ILC 2018 Report*, *supra* note 1, p. 299, para. 363.

¹⁰⁴ A/RES/73/203, para. 4.

¹⁰⁵ U.N. Doc. A/C.6/71/SR.22 (2016), p. 11, para. 61.

¹⁰⁶ English courts have already made use of the conclusions and commentaries, as adopted on first reading – see *R (Freedom & Justice Party) v. Secretary of State for Foreign & Commonwealth Affairs* [2018] EWCA Civ 1719 (U.K. Court of Appeal), para. 18.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

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